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No. 97-1883

In The

Supreme Court of the United States

October Term, 1997

CHARLES X. DANIELS and JINO S. ST. LOT,

Petitioners,

vs.

SIX L'S PACKING COMPANY, INC., FARM-OP, INC., and LAWRENCE LIPMAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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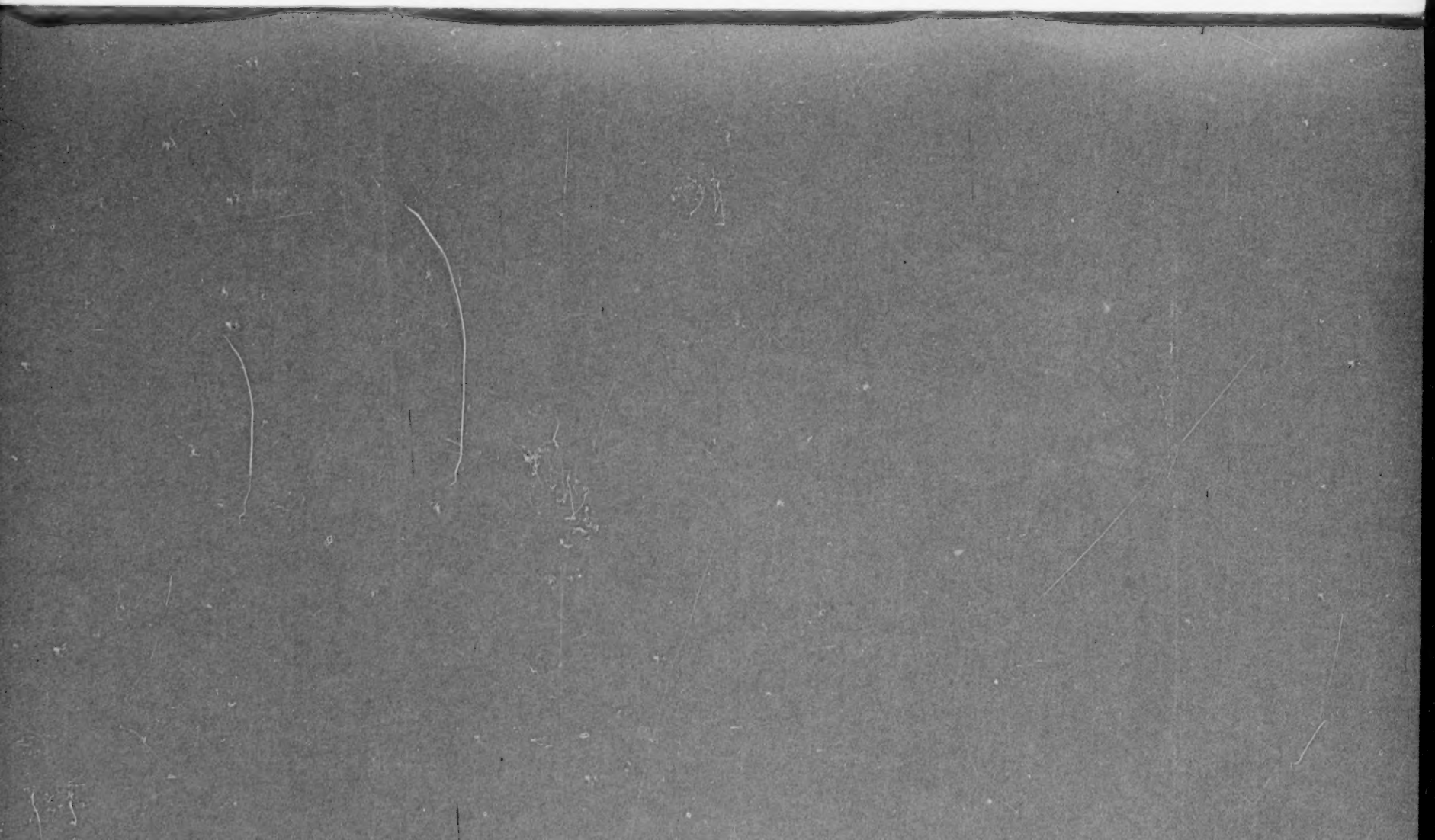

QUESTION PRESENTED

The question as phrased by Petitioners provides no guidance in this case, since the obvious answer to the question would be in the affirmative. The question which was presented to the Circuit Court was whether the manner in which the trial court conducted the trial constituted "plain error," not whether a betrayal of the appearance of impartiality deprives a civil rights litigant of the constitutional right to a fair trial.

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STATEMENT OF THE CASE

The Petitioners do not refer to the Appendix to their Petition when they make their lengthy recitation of the facts. Also, they state the fundamental question in this case in terms which incorrectly indicate that it has been established that the trial judge displayed open hostility toward Petitioner's counsel in the presence of the jury and betrayed the appearance of impartiality, depriving them of a fair trial. Respondents suggest that the Petition should be denied based on the fact that the Petitioners have not provided the Court with an adequate appendix under Supreme Court Rule 14(i). The factual representations by the Petitioners are not supported by the missing record. If the Court is going to consider the Statement of the Case as if it were supported by citations to an appendix, Respondents have included in the appendix to this brief a copy of the Statement of the Case contained in their Appellees' Brief before the Circuit Court. Each statement of fact contained in the appendix to this brief is supported by a citation to the record which was before the Circuit Court.

On page 14 of the Petition, the Petitioners make representations regarding the oral argument before the Eleventh Circuit Court. Respondents are unaware of the source of these representations. Respondents do not stipulate that the Petitioners have accurately portrayed the content of the oral argument.

SUMMARY OF ARGUMENT

Although the Petition is fact-intensive, the Petitioners have provided no record to support their factual representations. Instead, they represent that the evidence established without dispute that their constitutional rights were violated, and that the Eleventh Circuit Court of Appeals decided that the deprivation of constitutional rights would go unremedied because the Court does not like employment discrimination cases. If these extraordinary charges were true, the Petitioners would have provided a record supporting them. The actual question presented to the Eleventh Circuit Court was whether the Petitioners/Appellants had met the "plain error" standard of review. There is nothing in this fact-based case which indicates that it would be appropriate for certiorari review by this Court.

ARGUMENT

Both of the argument headings in the Petition assume as fact that the District Court denied the Petitioners' due process rights, and that the Eleventh Circuit Court endorsed that denial of due process. The Petitioners provide no support for the claim that the decision by the Eleventh Circuit Court of Appeals endorsed the denial of anyone's constitutional rights. There is nothing in the appendix which would indicate that the issue presented to the Eleventh Circuit Court of Appeals was whether it should endorse a denial of constitutional rights. The issue

before the Court was whether the Petitioners had established plain error, not whether the Court should endorse a denial of constitutional rights.

The Petitioners' argument assumes its own premise. It assumes that a denial of due process occurred, and that the Eleventh Circuit Court approved of that denial of due process. In actuality, the Petitioners are unhappy with the result in the prior courts, and they are requesting that this Court review the voluminous record to determine whether the Eleventh Circuit Court should have found plain error. This case does not present any of the considerations governing review on certiorari specified in Sup. Ct. R. 10.

The Respondents have no dispute with the holdings in the cases cited by Petitioners. Certainly litigants should not be deprived of their right to a fair trial. The fact that litigants are entitled to a fair trial does not mean that these litigants were denied that right. The decision by the Eleventh Circuit Court was based on the failure of the Petitioners to meet the plain error standard of review, not a determination that they should be denied their rights. The Petitioners cite to seminar materials for the proposition that federal courts routinely dispense with employment discrimination cases based on something other than their merits. They assert that employers are becoming increasingly adept at covering up discrimination, and that the federal courts "have raised the bar" on claimants' evidentiary burdens, causing a chilling effect on these claims. The counterpoint to the seminar materials is that employers appear to have become increasingly aware of the laws regarding employment discrimination, and that they have taken steps to ensure

that discrimination does not occur. If there are more summary judgments in employment discrimination cases, those summary judgments reflect an increase in baseless litigation because of increased consciousness of employment discrimination law.

A decision by this Court in this case would have no effect on existing law. Neither the decision by the Eleventh Circuit Court nor the decision by the District Court was reported. If this Court were to review this case on the merits, it would simply be reviewing the lengthy transcript of trial in an effort to determine whether plain error occurred. In its unpublished decision, the Eleventh Circuit Court necessarily concluded that plain error had not been established. The Court did not rule that litigants in employment discrimination cases are not entitled to a fair trial. If certiorari review is appropriate in this case, it is appropriate in every case in which a litigant does not prevail on a claim of a violation of constitutional rights. Any litigant who loses on such an issue could make the assumption that the trial court denied his or her rights, and that the circuit court affirmance was an endorsement of the denial of constitutional rights by the trial court. *See generally,* 16B & 17, Charles A. Wright et al., *Federal Practice and Procedure* §§4004.1 & 4035 (2d ed. 1996, 1988).

CONCLUSION

The position of the Petitioners is identical to the position of any other litigant who loses a case where it is asserted that his/her constitutional rights were violated. The Petitioners have presented no basis for this Court to exercise its certiorari jurisdiction. The Respondents request that the Petition be denied.

Respectfully submitted,

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STATEMENT OF THE CASE

i.

Course of Proceedings and Dispositions in the Court Below

Daniels and St. Lot sued the Appellees, alleging civil rights violations under Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991, 42 U.S.C. § 2000(e), et seq., under 42 U.S.C. § 1981, and for damages arising out of common law negligent supervision (RE at 2, V2-54). Daniels and St. Lot filed motions in limine regarding letters of determination by the EEOC, requesting that the Court exclude the letters from evidence at trial. (V3-98, 105). In the Daniels motion, it was asserted that the EEOC had issued a letter of determination on February 27, 1995, prior to the filing of this suit. (V3-98 at 1). In that letter, the investigator stated that the evidence obtained during the investigation did not establish a violation of the statute. (V3-98 at 2). The basis of the motion was the assertion that the " . . . letter of determination is clearly not trustworthy, and any probative value that such letter may have is substantially outweighed by the danger of unfair prejudice being done to the Plaintiff and the threat that juror confusion will be created and that the jury will be misled thereby." (V3-98 at 2). The basis of the motion by St. Lot is identical. (V3-105 at 1-2). Both motions were denied as to the EEOC letters with the recommendation that the trial judge give a cautionary jury instruction. (RE 5 at 1, V5-181 at 1). Counsel for Daniels and St. Lot first drew the jury's attention to the EEOC letters in his opening statement, (V9-232 at 37-38), where he instructed the jury that the

document " . . . is not worth any more than any other witness who might testify before you . . . ." *Id.* at 37. The actual objection to the admissibility of the letters at trial consisted of the following dialogue:

> MR. MANZINI: We have no objection to anything but these letters of determination from the EEOC, which are third-party documents. I assume the rule has been cited as the exception to the hearsay rule on business records. This is not –
>
> THE COURT: Official investigations required by statute, that is 803(8). Business records is 803(6), this is 803(8).
>
> MR. MANZINI: All right. You know, they had listed a witness from the EEOC to be here and not only to authenticate, but I thought I would be able to ask that with questions such as, did you interview all of the witnesses that were given to you; and if so, what did they say?
>
> THE COURT: I think you brought that out, did you not, Mr. Manzini? I recall your cross-examination of – or it was during your direct examination of some of the witnesses that at least interviews were not conducted.
>
> MR. MANZINI: I did ask –
>
> THE COURT: I believe they're admissible, Mr. Manzini. I will instruct the jury, however, that they are not dispositive of any issue and they may consider them for whatever they're worth.
>
> MR. MANZINI: Okay, Judge.
>
> (V14-237 at 87-88).

The initial brief asserts without referencing the record that Daniels and St. Lot attempted to introduce Mr. Taylor's opinion regarding the motivating factors behind the decision to terminate their employment. (Brief at 12). The brief continues with the assertion without citation to the record that Judge Wiseman granted a motion in limine prohibiting them from eliciting Mr. Taylor's opinion or questioning him about other inculpating statements made during his deposition. (Brief at 12). The brief continues by making representations regarding the contents of a deposition of Mr. Taylor taken November 10, 1995. (Brief at 12). These representations do not reference the record, although there is a reference to the Records Excerpts which were filed with the initial brief. (Brief at 12-13). The deposition of Mr. Taylor was never offered into evidence.

Daniels and St. Lot represent that Judge Wiseman directed "pervasive inflammatory and mostly gratuitous comments" at their attorney, Mr. Manzini. (Brief at 14). There are also references to Judge Wiseman allegedly berating, criticizing or admonishing Mr. Manzini in front of the jury. (Brief at 14). Daniels and St. Lot also represent:

> Unfortunately, the cold transcript does not fully depict Judge Wiseman's bellicose demeanor and tone, or the derisiveness that he conveyed to the jury by his relentless comments and interruptions.
>
> (Brief at 15).

In response, the Appellees invite the Court to read in context each of the rulings by Judge Wiseman which contains a reference to the record. Also, the Court should

consider the following instruction by Judge Wiseman prior to opening statements:

> You are the exclusive judges of the evidence, of the credibility of witnesses and the facts of the case. It's going to be up to you to decide what parts, if any, of a witness' testimony you choose to accept or to reject. The law, however, you should take as I give it you and apply that law to the facts as you find them.
>
> In making those credibility determinations, you should look to a witness' manner and demeanor while on the witness stand, look to whether or not they appear to be telling the truth or appear to be telling a falsehood. Look to whether or not they have an interest in the outcome of the case, whether or not they have a bias or prejudice for one side or the other, whether or not they've become involved in a material contradiction in their testimony, whether at some previous time they've said or done something which is inconsistent with what they tell you here today.
>
> And after reviewing all of these things and anything else that appeals to you in your common sense and good judgment as to whether or not a witness is telling the truth or telling a falsehood, it's going to be up to you to decide whom you believe and how much and which parts of a witness' testimony you choose to believe.
>
> (V9-232 at 18-19).

In the instructions to the jury at the conclusion of the case, Judge Wiseman added:

> You have two main duties as jurors. The first one is to decide what the facts are from the evidence that you saw and heard here in Court.

> Deciding what the facts are is your job, not mine. And nothing I've said or done during this trial is meant to influence your decision about the facts in any way.
>
> (V15-238 at 72).

Later in the instructions, he added:

> Several more general points that I want to address before I begin explaining the theories of the parties. The lawyers for both sides objected to some of the things that were said or done during the trial. Do not hold that against either side. The lawyers have a duty to object whenever they think that something is not permitted by the Rules of Evidence. Those rules are designed to make sure that both sides receive a fair trial.
>
> And do not interpret my rulings on their objections as any indication of how I think the case should be decided. My rulings were based on the Rules of Evidence, not on how I feel about the case. Remember that your decision must be based only on the evidence that you saw and heard here in Court.
>
> (V15-238 at 79).

The final instruction to the jury prior to its retirement, Judge Wiseman stated:

> Now, let me finish up by repeating something I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way, in any way. As far as you're concerned, ladies and gentlemen, I have absolutely no opinion about how you should decide this case. You decide it for yourselves and decide whether or not the Plaintiff has

> proved – each Plaintiff has proved his case against the Defendant or Defendants to your satisfaction.
>
> (V15-238 at 102).

Judge Wiseman's problems with Mr. Manzini are documented in the record. Mr. Manzini repeatedly attempted to solicit obvious hearsay testimony. *See, e.g.,* V9-232 at 79, 81, 83, 88, 89. It was Mr. Manzini's repeated attempts to introduce the same hearsay testimony which led to excusing the jury and giving the caution to Mr. Manzini which is quoted out of context on page 15 of the initial brief. (V9-232 at 91). Shortly after these instructions, it was necessary for Judge Wiseman to stop Mr. Manzini from repeating the answers to questions in followup questions. (V9-232 at 97-98). The actual question which prompted the instruction was:

> You say that he told you that he had no personal knowledge of the things that are written on that document?
>
> (V9-232 at 98).

On the next page in the transcript, Mr. Manzini improperly asked his own client about his testimony in an earlier deposition. *Id.* at 99. In this portion of the transcript, Mr. Manzini repeatedly elicited testimony from his client regarding whether Mr. Poklemba said that he had been present at a meeting. *Id.* at 97, 98, 99. The culmination of the repetitious questioning by Mr. Manzini was:

> Uh, is there any doubt in your mind, and please look at the jury and tell them, that Mr. Poklemba told you he was there when they fired you or when they decided to fire you?
>
> (V9-232 at 99).

Shortly thereafter, Judge Wiseman had to strike more hearsay answers. (V9-232 at 110). More hearsay answers were stricken seven pages later in the transcript. *Id.* at 117. Hearsay objections were sustained on pages 127 and 128 of the same volume. Mr. Manzini was specifically eliciting this hearsay testimony. *See also Id.* at 127, 128. Mr. Manzini concluded his examination of his client by asking him to offer his "best guess" of why he was fired. *Id.* at 143.

The second day of testimony began with Judge Wiseman having to instruct Mr. Manzini to stand when he addressed the Court. (V10-233 at 4). He later had to instruct Mr. Manzini to quit leading his witness. (V10-233 at 89). The initial brief twice quotes out of context a portion of an exchange between Mr. Manzini and the Court. (Brief at 18, 34-35). The actual dialogue, including the omitted portions, stated:

> THE COURT: Now, Mr. Manzini, in case you don't know, a leading question is a question that suggests the answer to the witness.
>
> MR. MANZINI: *I apologize.*
>
> THE COURT: And you're repeatedly violating the rule of law and rule of evidence and you ought to know better. And I had cautioned you about it a number of times and if you don't stop, I'm going to declare a mistrial.
>
> MR. MANZINI: *I apologize. It's second nature and I apologize.*
>
> THE COURT: It better become first nature for you not to do it, Mr. Manzini, because it's not going to happen in this Court. I don't know where you practice, it's not going to happen

here. Now, I've cautioned you out of the presence of the jury. I'm doing it in the presence of the jury now because I want you to stop.

MR. MANZINI: *I apologize. I respect the Court's position on this. I just can't even explain why I do it. It's second nature. I apologize.*

(V10-233 at 91) (italicized portions omitted from quotations in initial brief).

In the previous nine pages of the transcript, objections had been sustained to Mr. Manzini's leading questions on five occasions. *Id.* at 82, 83, 84, 86, 88-89. The dialogue occurred shortly after another objection to the leading questions. *Id.* at 90. Another objection to leading questions was sustained a few pages later. *Id.* at 95.

During the direct examination of St. Lot, the following exchange occurred:

THE COURT: Mr. Manzini, I have to keep telling you that a leading question suggests the answer and it is not permissible for you, as a lawyer in direct examination, to suggest the answer. Now, please try to observe the rules of evidence.

MR. MANZINI: It's force of habit. It's my fault, I apologize.

THE COURT: I don't know where you picked up that habit.

(V11-234 at 118).

A few pages later, the following exchange occurred:

Q. Let's go back to the day that Charlie got fired. Tell us, be very specific, what he actually

said to you when he came to your office that day.

MR. HUME: Your Honor, objection. It's been asked and answered.

THE COURT: That who came to his office?

MR. MANZINI: Mr. Poklemba.

THE COURT: That has been asked and answered. The objection is sustained.

BY MR. MANZINI: Q. I believe you said he used the words, I got Charlie Daniels.

MR. HUME: Objection.

THE COURT: Sustained. Mr. Manzini, I just sustained the objection, then you go right ahead and do it. Disregard that, ladies and gentlemen. Ask another question, Mr. Manzini.

BY MR. MANZINI: Q. What did you think he meant when he used those words?

MR. HUME: Objection.

THE COURT: Sustained.

(V10-233 at 121-22).

A few pages later, the record states:

Q. Do you know if he was suspended, reprimanded or threatened with termination as a result –

MR. HUME: Objection, unless the foundation is laid.

THE COURT: How would he know that, Mr. Manzini, other than by hearsay? How would he

> have personal knowledge of that? The objection is sustained.
>
> MR. MANZINI: Okay.
>
> (V10-233 at 128).

A relevance objection and a hearsay objection were sustained two pages later. *Id.* at 130. The hearsay objection occurred when Mr. Manzini asked Mr. St. Lot to testify regarding whether "word got around" that he had been fired. *Id.*

Another example of Mr. Manzini's trial technique is seen in his cross-examination of Jack Poklemba. (V14-237 at 52-86). For several pages in the transcript, Mr. Manzini made detailed factual representations, and confirmed that Mr. Poklemba did not know those purported facts. *Id.* at 57-59, 73-74. The first round of "don't know" testimony was wrapped up with the following question:

> So, basically, you don't know anything that happened until the morning that you were told to go get the keys from Jino?
>
> *Id.* at 59.

Shortly after this non-testimony, the following exchange occurred:

> BY MR. MANZINI:
>
> Q. Now, you've also – by the way, Mr. Taylor, as we discussed in your deposition, says you're a pathological liar?
>
> A. I disagree with him there, sir.
>
> Q. Do you think he's a pathological liar?

A. No, I don't.

Q. Do you know why he would say that?

(V14-237 at 66).

A review of Mr. Taylor's testimony discloses no such accusation. (V11-234 at 31-171). In his closing argument, Mr. Manzini inaccurately represented to the jury that Taylor had testified that he thinks Jack Poklemba is a pathological liar. (V14-237 at 226). This brief will not address the remainder of the out-of-context quotations except to refer the Court to the record for the proper context. However, it should be pointed out that in closing argument, Mr. Manzini vouched for his clients' positions by stating, "I wouldn't be standing here right now representing Charlie and Jino if I didn't believe that they were treated unfairly." (V14-237 at 215). Judge Wiseman sustained an objection, and the Court instructed the jury that the attorney's personal beliefs had nothing to do with the case, and that they should disregard Mr. Manzini's remark. *Id*. Immediately after that instruction, Mr. Manzini told the jury:

> The – there have been times throughout this trial when I asked questions that – or said things such as I did just now, that were not perfect things to say to a jury. My questions were not perfect either sometimes, and, you know, objections were made and I – I'm not pulling punches here. I mean, sometimes I was wrong and I was taken to task for that.
>
> But I implore you, I beg you to listen to everything that was said to you, and not to hold that – any of what you might perceive was my over zealousness, my willingness to try a different

> approach to have evidence presented to you, that you not hold that against these people because that wouldn't be right and it wouldn't be fair, because each case must be won or lost on its facts, not on the personality of the lawyers, nor whether the lawyers are clever or not clever. It's got to be won on the facts. It's got to be won on whether it's just or not.
>
> *Id.* at 215-16.

Later in his argument he stated, "It's beyond me how companies can operate on that basis." *Id.* at 231. He told the jury that he was impressed with the testimony of one witness. *Id.* at 233. After an objection was sustained, Mr. Manzini immediately told the jury that the same witness " . . . was absolutely inscrutably truthful . . . ." *Id.* The Court instructed the jury that the lawyer's personal opinion was just not relevant to the case at all. *Id.* Immediately after the instruction, Mr. Manzini said regarding the same witness, "Trust me, it wasn't easy for him to come here." *Id.*

The jury instructions, which were printed and provided to each juror to take into the jury room, included an instruction regarding the weight the jury should give to the EEOC determination letters. (V15-238 at 71, 93-94). In the instructions conference prior to closing arguments, counsel for Daniels and St. Lot stated that he had no objections to the charge. (V14-237 at 193). Although he had some suggestions and requests regarding other portions of the charge, he said nothing about the cautionary instruction regarding the EEOC letters. *Id.* at 193-96. Judge Wiseman made some of the changes requested by Daniels and St. Lot. *Id.* at 195-96.

The jury returned a verdict which found that neither Daniels nor St. Lot had proven by a preponderance of the evidence that intentional race discrimination was a motivating factor in their discharge. (V15-236 at 103). The jury was polled, and each juror responded that the verdict was his or her verdict. *Id.* at 104.